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JURISDICTION IN ADMIRALTY OR AT COMMON LAW FOR TORT ARISING OUT OF A MARITIME CONTRACT.

Ninth Circuit Court of Appeals holds by a majority ruling that, if an injury arising out of negligence in unloading a vessel engaged in interstate trade happens at a dock, such injury gives a right of action at common law, and exclusive jurisdiction is not in admiralty. Swayne & Hoyt v. Borsch, 226 Fed. 581.

A dissent by Ross, C. J., vigorously contests this ruling and his dissent abounds in discussion of federal decision in support of his contention that admiralty law "embraces all maritime contracts, maritime torts and maritime injuries and applies to all vessels engaged in transportation, whether upon inland waters or upon the seas. It applies to ships in commission, whether lying in the water alongside a wharf or suspended in a dry dock for repairs."

The position of the majority of the court is that locality of the injury suffered is the test, that is to say: "The question whether admiralty jurisdiction over it (the injury) is determined by the place of the damage and not by the place of the origin of the tort." The prevailing opinion, like the dissenting opinion, relies entirely on federal decision, both by lower courts and the Supreme Court, for its conclusion.

One reading these two opinions is struck by the emphasis laid upon particular expressions found in the decisions referred to and he wonders why a question like this of so vital a character is not considered settled and settled long ago. Occurrences producing injury frequently must have happened in which it was neecssary to decide the question whether a state court could take cognizance of the injury suffered or whether it came under admiralty law, as to which exclusive jurisdiction is vested in the federal district courts.

It is even a matter of wonder that the prevailing opinion goes no further back for a case it claims to be directly in point by the federal supreme court than the decision in The Plymouth, 3 Wall. 20, 18 L. ed. 125, as leaving undisturbed a long line of cases before that and establishing the doctrine for a long line of cases since that, down to Martin v. West, 222 U. S. 191, 36 L. R. A. (N. S.) 592.

In the Plymouth case it was said: "The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been complete."

The dissenting judge would seem to us to be put to it to distinguish the Plymouth case before contending, that the test of jurisdiction lies in the fact, that an employment in which an injury is suffered is of a maritime nature, but not once does he cite or allude to the Plymouth case in his discussion. He contents himself with saying: "It is sufficient to cite in negation of the contention to the contrary (of his views) the doctrine of the recent decision of the supreme court in the case of Atlantic Transport. Co. v. Imbroack, 234 U. S. 52, 51 L. R. A. (N. S.) 1157."

The prevailing opinion speaks of that case as follows: "What was decided in that case was that admiralty had jurisdiction of a suit *in personam* to recover for injuries sustained by an employe who is engaged in loading a vessel at a dock in navigable waters, the employe having been injured while at work on the vessel. The court re-

affirmed the general principle 'that the test of admiralty jurisdiction in tort in this country is locality.' The opinion cites and leaves undisturbed a long line of decisions made both before and since the decision in The Plymouth, 3 Wall. 20, that where the tort is committed, not in the vessel, but on the shore or on a dock * * * the question whether admiralty has jurisdiction over it is determined by the place of the damage."

The dissent, instead of discussing any other case claimed to be precisely in point, quotes from the case of Workman v. Mayor, 179 U. S. 552, as to the practical necessity of the general principles of maritime law being for application by one tribunal rather than be "overthrown by conflicting decisions of state courts." This is not persuasive at all to the point involved. If that one tribunal has held, that maritime law only applies according to the locality of the damage, then state courts may decide all questions, if the locality brings an injury under their jurisdiction. That the rule of damage "may be one thing in one port of the United States and a different thing in another," appears bad for owners of vessels, but it may be said they take their chances in subjecting themselves to the laws of the states according to the ports they enter.

It seems to us that it is not particularly necessary to have a uniform rule as to all ports vessels may enter. Landsmen take their chances on entering different states, and unless their transactions and their injuries come under exclusive regulation by Congress, then Congress is content for the states to prescribe their own regulation. Congress may gather to the jurisdiction vested in federal courts over admiralty incidental things for the protection of seagoing trade or that plying in navigable waters, but, until it does, it would seem that the state may regulate it, just as it does those things outside of federal regulation of interstate commerce.

NOTES OF IMPORTANT DECISIONS.

DEATH—EXPECTANCY OF LIFE SHOWN BY MORTALITY TABLES.—In Fifield v. Town of Rochester, 95 Atl. 675, decided by Vermont Supreme Court, objection was made to admissibility of American Experience Mortality Tables to show expectancy of life in an action for death caused by negligence. This was upon the theory, as made by defendant, that such tables were for purposes of insurance and were based on selected lives, that is to say, persons in sound health, and decedent was subject to attacks of asthma.

The evidence disclosed that decedent had asthma some years before, when living in another state and for the last two years of his life he did not have it at all.

The court said that, though the tables were for insurance purposes, yet this did not make them "improper evidence on the probable duration of life in a case where the person was not of insurable condition. Like the Carlysle, the American Experience, Tables are not conclusive and must be considered in connection with evidence showing the condition of the person's health, his habits of life and any other circumstances having a legitimate bearing upon the question."

There is then cited with approval a Kentucky case citing much authority, to the effect that "such tables show only the probable continuance of life and not the duration of ability to earn money," but they may be "in connection with the other proof in the case for what they may be worth" "in determining the probable duration of his capacity to earn money." See Ry. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205.

There is considerable authority supporting the conclusion of the instant case, but courts have often rejected evidence of a less speculative nature than these tables, where the basis on which they rest is not shown. On principle it would seem that the burden would be on the party offering the tables in evidence to lay the foundation therefor. When they are offered in the case of a man not in sound health this foundation would appear not sufficiently shown, and also it might be urged that the hazards to which his life are exposed, thus taking him out of the class of insurable risks, the foundation is not laid. Why in such a case should not the whole matter be left to the experience of the jury in life,

unhampered by mortality tables at all, except that defendant might offer them to restrict the period and urge that a shorter rule should obtain in a particular case. As evidence for plaintiff it seems to us they should not be admitted, unless the foundation be strictly laid.

WATERS AND WATERCOURSES—RIGHT OF CONDEMNATION WHERE PUBLIC SERVICE COMPANY EXCEEDS ITS POWERS.—In Meier v. Citizens' Water Co., 95 Atl. 704, decided by Pennsylvania Supreme Court, it was urged that a water company lost its right to appropriate, by exercise of the right of eminent domain, the waters of a stream, to the injury of riparian owners, by reason of the fact of supplying water outside of the territory it was chartered to supply.

The court said: "It is argued, and with much force, that the water company furnished a portion of the waters appropriated to persons, firms or corporations outside of the limits of the territory in which it had the right to furnish water to the public, and that by reason thereof the entire appropriation was unlawful. The learned court below took this view of the case and decided accordingly. While this contention is plausible, it is not convincing, to our minds. The water company was incorporated to furnish water to the public in the borough of Scottsdale and what it did by way of furnishing a small supply to persons outside of the borough limits was only a mere incident of its main purpose. If it exceeded its corporate powers by making an improper use of the water which it takes, it is answerable to the commonwealth alone."

This case was perhaps properly ruled by the Supreme Court, because it seems rather to have involved unlawful use of water that may have been properly appropriated, but we think that, had it appeared in the proceeding for condemnation, the purpose was to supply water, additionally to another district outside of its territory, the proceeding should have been dismissed. The corporation having a right to condemn for a lawful purpose could not mingle with that purpose one that was not lawful. This illegality would taint the entire proceeding, especially in condemnation proceedings, which must follow strictly the statute authorizing condemnation. There might also have been here some question of estoppel, or the limit of the rights of owners was to restrain the water company to the use of so much of the stream appropriated as was necessary for the district the company was chartered to supply.

CONTRACT — EXCUSE FOR NON-PERFORMANCE.—Hood v. Moffett, 69 So. 664, decided by Mississippi Supreme Court, holds that it is no excuse for non-performance of a contract by a physician to attend one in expected confinement, that to have done so would be to make him "leave a patient who is in a precarious condition to attend one that he had previously contracted to attend."

The court says: "This proposition differently expressed amounts simply to this: If a person assumes obligations to different parties, the performance of which may become incompatible with each other, both parties being entitled in equal right, is it an excuse for a default to one party that both obligations could not be performed, and that the person bound chose to perform his obligation to the other? In Hein v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588, this question was answered in the negative. Appellant's contract in this respect was without qualification and the rule is that 'as a man consents to bind himself so shall he be bound.' 3 Elliott on Contracts, § 1891."

If both parties stand "in equal rights" to such a contract at all times that it remains obligatory, the ruling of the court is right. It begs the whole question, however, to rule that in such circumstances as stated they do stand "in equal right."

In the first place we think there is an implied understanding between the parties to such a contract, that a physician shall not abandon a case to which he has been called and leave a patient exposed to death. In the second place, we believe that had the contract with the plaintiff expressly have provided that he must leave a patient to which he has been called, this part of the contract would be condemned as contrary to public policy. A physician practices medicine under authority of a license and he must be faithful to the state and the people for whose benefit that license is required.

It cannot be thought that plaintiff in contracting as she did expected that defendant would put away entirely his business so as to be ready at all times to comply with his contract with her. If she agreed, however, that he should pursue his calling as usual, she took

chances on his being able to attend her in her anticipated illness.

Not only we think as to medical services, but as to others of a professional or business nature which require personal attendance, there is an implied agreement that a contract for such attendance shall not interfere with one's ordinary business, unless it is expressly so stated. The stronger reason, however, is as to medical services, because of the contract being opposed to public policy.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION, COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 91.

In the opinion of the Committee is it proper professional practice for attorneys to investigate unsatisfied judgments and communicate with the judgment creditors asking their authority to proceed with the collection? For illustration, the method of procedure adopted by such attorneys is indicated in the following form of communication enclosing a proposed contract of employment:

"There is a judgment on record in your favor obtained a number of years ago against a party who is now able to pay the debt.

"I have information which, I believe, will enable me to collect this judgment for you.

"If you will be good enough to authorize me to make this collection for you, upon the understanding contained in the paper enclosed herewith; I shall be pleased to promptly proceed with the collection.

"Trusting to hear from you as soon as conveniently possible, I beg to remain,

"Yours very truly,

"_____.

"(Enclosure.)

"I hereby retain John Doe, attorney at law, of New York City, to collect a judgment, still outstanding and unpaid, recovered against ——.

"For such collection I hereby agree to pay my said attorney fifty per centum of any amount collected on said judgment.

"It being agreed that if no collection is made, I am not to be charged for any services to be rendered by my said attorney.

"It being further agreed that no settlement or compromise for less than the full amount, principal and interest, shall be made without my consent.

"Dated, New York, ——, 1915."

"_____."

Answer No. 91—In the opinion of the Committee, the practice is unprofessional.

QUESTION No. 92.

In the opinion of the Committee, is there professional impropriety in lawyers instituting a suit in this state upon promissory notes in the name of a client to whom the notes have been assigned after maturity and without consideration, the assignor and holder at maturity being a domestic corporation, and the assignee and plaintiff being also a domestic corporation and a subsidiary of the first corporation; the assignment having been made for the convenience of the parties, and with a view to the institution of a suit in the name of the assignee instead of in the name of the assignor?

In this connection we call the Committee's attention to the decision in McBride v. The Farmers' Bank, 26 N. Y. 450, from which we conclude that it is the view of the court that such an assignment is not illegal.

Answer No. 92—Upon the facts stated, the Committee sees no impropriety in the course suggested, unless the attorney knows, or has reason to believe, that the assignment was for the purpose of working fraud or other injustice.

QUESTION No. 93.

In an action, judgment is procured in favor of plaintiff. Defendant wants to settle case with plaintiff's attorneys direct. Plaintiff's attorneys insist upon settlement being made through defendant's attorneys. Defendant's attorneys do not wish to consummate settlement until their bill is paid. The matter stays in statu quo for several weeks. By what consideration should plaintiff's attorneys be guided? —their duty to their client to collect the judgment, or, should they stand still and insist upon the matter being settled through defendant's attorneys? Whether an execution would collect the judgment is not known, but it might imperil an early settlement.

Answer No. 93—In the opinion of the Committee, the plaintiff's attorneys having done all that professional courtesy requires, and the legal relationship between the defendant and his attorneys having moreover terminated,* there is no impropriety in plaintiff's attorneys dealing directly with the defendant.

*Upon the termination of the legal relationship, see Lusk v. Hastings, 1 Hill, 656; Magnolia Co. v. Sterlingworth Co., 37 A. D., 366; Conklin v. Conklin, 113 A. D., 743.

THE DISTINCTION BETWEEN A MATERIALMAN AND A CONTRACTOR UNDER THE MECHANIC'S LIEN STATUTES.

In the foreclosure of mechanic's liens under the different statutes, it is very important at all times to ascertain the class to which the plaintiff belongs. The remedy is not by common law but by statute and it is only those that come within the statute who are protected. The statute is to be strictly construed but when the party comes within its terms it is to be liberally construed.[1] It is easy to distinguish who is a laborer under the several statutes because the ordinary meaning of the word "laborer" is given it.[2] This means anyone who does work and labor necessarily used in the erection and construction of the structure, whether it is a dwelling house, factory, pavilions, a system of buildings used as a unit for some particular purpose, sidewalks, fences, and railroads. In order that the laborer's work and labor may go into any building, etc., it is necessary that he have something to work upon. Ordinarily, the person who furnishes the things for the laborer to work on, is called a materialman. The person who agrees to furnish both work and labor is generally called a contractor. Where the one quits off and the other begins, has on several occasions puzzled the lawyers and some of the courts have reversed themselves on the same proposition.[3] Ordinarily, there is no reason for a lawyer to err in determining which class the party belongs to, much less a court.

The mechanic's lien statutes are equitable remedies given to laborers, contractors, and materialmen to enforce the collection of the amount due them for work and labor done and material furnished that went into and became a part of the structure, whatever it might happen to be, upon the theory that the owner's real estate is enhanced in value to the amount of the claim.[4] Then the contractor who furnishes work and labor together with material must show that they went into and became a part of the structure. The work and labor done and material furnished must be done for the particular building or the person furnishing them is not a contractor. He becomes on such an occasion a materialman. If the work and labor done and material furnished are not for any particular building and can be used indiscriminately by customers generally, such material, and the work and labor done upon it, both become a commercial commodity and can be sold in mass.[5]

Doors, screens, window sash and frames, plumbing fixtures, electric fixtures and hardware are good examples of material that has had work and labor done on them to place them in shape for sale. They are carried in stock and sold in mass. A builder can go to a merchant and buy either of them from stock. The merchant, be he either a lumberman, hardware dealer, or what not, buys them from a jobber[6] or manufacturer.[6a] The manufacturer, when

(1) Patter Mfg. Co. v. A. B. Meyer & Co., 171 Ind. 513-516.

(2) Webster's International Dictionary. Moore-Mansfield Co. v. Indianapolis, N. C. & T. Ry. Co., 179 Ind. 356; 101 N. E. 296, at 309.

(3) Hegener & Co. v. Frost (Ind. App.), 108 N. E. 16, either forgets or overrules Caulfield v. Polk, 17 Ind. App. 429; and Parker Land Co. v. Reddick, 18 Ind. App. 616, at 619, and the case of Clark v. Huey, 36 N. E. 52, 12 Ind. App. 224; Moore-Mansfield Co. v. Indianapolis, etc., Co., 179 Ind. 356; 101 N. E. 296, overruling Traction Co. v. Bennan, 174 Ind. 1.

(4) Phillips on Mechanic's Liens; Rockell on Mechanic's Liens; Jones on Liens; Moore-Mansfield v. Indianapolis, etc., Co., supra; Hughes v. Torgerson, 96 Ala. 346; 11 So. 209; 38 Am. St. 105; 16 L. R. A. 600.

(5) Caulfield v. Polk, supra; Foster, etc., Co. v. Sigma Chi, etc., 49 Ind. App. 528; s. c. N. E.; Haynes v. Holland, 48 S. W. 400 (Tenn. Chan. Appeal). This is a well-reasoned case. Moore-Mansfield Co. v. Indianapolis, etc., Co., supra; Maul v. Yannelle, 173 Ind. 535; 91 N. E. 7; Hughes v. Torgerson, 96 Ala. 346; 11 South. 209; 38 Am. St. 105 and annoted at length in 16 L. R. A. 600.

(6) Steward v. Winters (N. Y.) 4 Sandf. Chan. 587 at 590; Webster's International Dictionary.

(6a) Lovett v. Brown, 40 N. H. 511; Commonwealth v. Thackara Mfg. Co., 156 Pa. 510; s. c. 27 Atl. 13 at 14; Peoples v. New York, etc., Co. (N. Y.), 11 Abb. 40 at 42; Consumers Brewing Co. v. City Norfolk (Va.), 43 S. E. 336.

he made the articles, had no particular person or structure in mind. The window frames would do as well for a factory as for an ordinary house. The electric fixtures could be used as well in a church as in a saloon. The plumber's supplies could be placed in a gymnasium as well as in a hotel. The doors he made could be placed on either of the above-named structures. The person who furnishes such things is called a materialman under the statutes, although he does enter into a contract to furnish them.[7]

Nails, hinges and locks are used in the construction of a house. They are materials and the person that agrees to furnish them is a materialman. But suppose A, who owns a lot, lets a contract to B to construct a building for him. The building is to be erected in accordance with certain plans, specifications, and minute detail. Nothing short of a strict performance will be accepted. The hinges called for cannot be purchased anywhere out of stock or mass. B lets the furnishing of the hinges to C. This particular hinge C finds out, after thorough search of the market, has never been made before, nor used. He has to go to a metal worker and have the hinges made in accordance with the details of the plans by which he is erecting the building. The metal worker used a thousand dollars in labor and fifty dollars' worth of material in making the hinges. He had to make them at his shop. The hinges were delivered to A, who approved them and had them put on the building. Could the metal worker under such circumstances foreclose a lien for work and labor done and material furnished in making these hinges for this particular building and for this particular person, as a sub-contractor? If C was a materialman, then the person furnishing it could not enforce his lien, for he would be furnishing material to another person who was himself a materialman.[8] This would open the way for the man who cut the tree in the forest to have a lien, if it were true. Could it be said that he was a person selling out of stock or mass? That particular kind of hinge did not exist before he made them. They could not be found anywhere. Then was he selling a commercial commodity? For that matter, the Supreme Court of the United States has said that labor is a commercial commodity.

The metal worker under such a state of facts comes under the definition of a contractor. The best definition of a contractor, and the one that has been approved by the court of last resort and lexicographers, is the one found in Halsted v. Stahl, 47 Ind. App. 600,[9] and that is "one who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control with respect to all petty details of the work.[10] A or B cared nothing, nor were they interested one iota about the petty details of making the hinges. The thing which they were particular about was the hinges completed according to detail for this building. This is the distinction: if material is especially prepared for a particular building and could not be used elsewhere, then the person who furnishes it comes within the definition above as to who a contractor[11] is; but if he sells material that does not have to be especially prepared and could be used by persons generally in erecting buildings, sold in bulk, out of stock or mass, he is a materialman and his

(7) Halstead v. Stahl, 47 Ind. App. 600; 94 N. E. 1056; Scannell v. Hub Brewing Co., 178 Mass. 288, 59 N. E. 628; Berger v. Trunblad, 98 Minn. 163, 116 Am. St. 353, 107 N. W. 543.

(8) Caulfield v. Polk, supra.

(9) s. c. 94 N. E. 1056.

(10) Evans, etc., Co. v. International, etc., Co., 101 Md. 210; 60 Atl. 667; 109 Am. St. Rep. 568, 577; 27 Cyc. 44 (d); 2 Jones on Liens, Sec. 1324; 20 Am. & Eng. Ency. of Law, 340; Parish's Appeal, 83 Pa. St. 111; Sweet v. James, 2 R. I. 270; Wilson v. Sleeper, 131 Mass. 177; Dewing v. Congregational Soc., 13 Gray (Mass.), 414; Jones v. Keen, 115 Mass. 170; Hawes v. Reliance W. W. Co., supra; Berger v. Turnblad, supra; Scannell v. Hub B. Co., supra; Daley v. Legate, 169 Mass. 257, 47 N. E. 1013.

(11) 2 Words & Phrases, p. 1534; Carey-Longbard Lbr. Co. v. Jones, 187 Ill. 203; s. c. 58 N. E. 347; Scannell v. Hub Brg. Co., supra; Steiner v. Haas, et al., 108 Mich. 488, N. W. 348.

lien must be foreclosed upon that theory or fail.[12]

It is sometimes very difficult to find a precedent on this theory and the writer sets out herewith excerpts from the leading cases on this point.

In Wilson v. Sleeper, the court said: "The labor was not performed on the premises, but was done on material which was designated and intended for use in the buildings on the premises, and was in fact so found. It has been held that a lien may be maintained for work thus done away from the premises, in preparing material which is intended for use, and actually used in the construction or repair of a building."[13]

In Hawes v. Reliance Wire Works Co., the court said: "It was a fixture or improvement especially designed and constructed for this particular building, and presumably on the credit thereof. It was to be made and fitted in the building and thus become a part of it. The defendant was a contractor for the construction of this improvement, and if he had brought any part of the materials on the premises, and the sale had taken place while the work was in progress, he could not have been deprived of his right to a lien upon the completion of the job in the building. But, as between defendant and McKinney, it could hardly be material that the work of construction should proceed at the shop or manufactory of the defendant instead of on the premises in question. It was being constructed by the contractor on the credit of the building, and with the knowledge and consent of the owner, the rights and liabilities of the parties would be the same in both cases."[14]

Thompson on Liens says: "A lien may sometimes be established for work done upon articles which are intended for use in the building and are actually used in its construction or repair. In such case the labor is to all intents and purposes performed in the erection, alteration, or repair of a building within the terms of the statute. Where, for instance, the inside finish for a house is sawed, planed, or molded at a mill, or the doors or windows are made at a carpentershop, or the iron work is prepared at a blacksmith shop, away from the premises, but really as a part of the work of construction, and the material upon which such work is done actually becomes a part of the building, a lien arises for such labor equally with the labor performed upon the land on which the house is erected. But it is essential that such labor be performed under an agreement that the articles upon which the work is done are to be used in the construction of the building against which it is sought to enforce the lien. Thus, if the owner of a planing mill saws lumber for a builder without any agreement for its use in any particular building, though the lumber is in fact used in the construction of a building which the builder was erecting at the time under contract for another person, the mill owner is not entitled to a lien on such building."[15]

In Evans, etc., Co. v. International, etc., Co., the court says: "The last ground of objection to the claim under consideration to be noticed is no more tenable than those to which reference has already been made. That is that there can be no lien by Bevan for work done at his shops as described in his evidence and not done at or on the building or premises. There can be no good reason for this contention. It will often contribute to economy as well as convenience in the construction of a building that necessary work in the preparation of materials for use in the course of construction be done away from the premises."[16]

(12) Rockel on Mechanic's Liens, Sec. 47-48; Caulfield v. Polk, 17 Ind. App. 429. Also see citations under 10 and 11.

(13) Wilson v. Sleeper, et al., 131 Mass. 177, citing authorities.

(14) Hawes v. Reliance Wire Works, 48 N. W. Rep. 448; Phil. Mech. Liens, Sec. 170; Hinchman v. Traham, 2 Serg. and R. 170; Wilson v. Sleeper, 131 Mass. 177.

(15) 2 Thompson on Liens, Sec. 1324.

(16) Evans, etc., Co. v. International, etc., Co., 101 Md. 210, pp. 222-3; 60 Atl. 667; 109 Am. St. Rep. 568.

In Berger v. Trunblad, the Court said: "It is true, as a general rule, that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done or the material delivered on the premises upon which the building is being erected. The case of Hawes v. Reliance Wire Works Co., 46 Minn. 44; 48 N. W. 448, however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. * * The plaintiff's right to a lien, then, is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises upon which it was being built, and the contractor had refused to permit the product of his work to be placed in the house. It follows that the fact that the work was done at the shop and not on the premises does not affect the plaintiff's right to a lien."[17]

In Great Western Mfg. Co. vs. Hunter the Court said: "The objection that the machinery having been manufactured at Leavenworth, Kansas, and shipped to the purchaser at Atchison, Kansas, to be by them conveyed to the site of their elevator in Saunders County, Nebraska, was not a furnishing of such machinery in the latter named county, has received careful attention, yet I do not think either the letter or the spirit of the statute requires that the machinery should be actually laid down at the site of the building by the liener, but if his labor, skill, or capital produced it, and set it in motion for that destination, and it finally reached it and was attached to the building for the purpose intended, then it was 'furnished' there by him without regard to the name in which it was shipped or others matters connected with its transportation."[18]

In Badger Lumber Co. vs. Mayes, the Court said: "But, in view of the policy of our law upon the subject (Mechanic's Lien's, we see no reason why one furnishing lumber at a planing mill, to be there worked into shape to put into a building, where it was intended by the vendor and purchaser that it should be so used, and where it has been used, should not be entitled to a lien as much as if he had furnished it there worked into proper form, * * *."[19]

In Atkins v. Little, it was held, "In an action to enforce a materialman's lien, the fact that the plaintiff's are non-residents, and the contract for the materials furnished were made outside the state and was originally to be performed outside the state, is immaterial."[20]

In Mallory v. LaCrosse Abattoir Co., the Court says: "The statute says to the defendant: 'By contracting with Nicholas Bros. to make the fixtures for your abbatoir, you gave credit to that firm, the same as though you had made it your partner or agent; and you ought to protect persons who deal with the firm on the faith of its contract with you, and whose labor and materials go to enhance the value of your property, and you must protect them, by standing as surety for your principal contractor to the extent of the value of such property.' "[21]

In Chaulle v. Island Gun Club, the Court said, "There is and can be no distinction as to the character of the items going to make up the lien of a sub-contractor without destroying the lien of the latter as a distinct lien. Each is entitled to recover his lien claim the amount due according to his contract."[22]

(17) Berger v. Trunblad, supra.

(18) Great Western Mfg. Co. v. Hunter (Neb.), 16 N. W. 759.

(19) Badger Lumber Co. v. Mayes, 57 N. W. 519.

(20) Atkins v. Little, 17 Minn. 342 (Gil. 320).

(21) Mallory v. LaCrosse Abattoir Co., 49 N. W. 1071.

(22) Chaulle v. Island Gun Club, 137 Pac. Rep. 511; 77 Wash. 304.

In Steiner v. Haas, the Court said: "It was not a case where the complainant merely sold a marketable commodity, which he kept on sale, or manufactured to order to be used by others; but it involved the furnishing of the necessary material, and combining them in a structure like a roof, a steam-heating apparatus, a water-system —in short, a dwelling house—all requiring skilled workmen, which the complainant provided and furnished upon his own responsibility and credit. See People v. Powers (decided this term) 66 N. W. 215. As this makes the complainant a contractor, within the statute, we have no alternative but to affirm the decree of the Circuit Judge with costs."[23]

In Clark v. Huey, the Court remarked, "If he furnishes them for the building, and they are used in it and the improvement is made by the authority and direction or the owner, the right to a lien attaches."[24]

Judge Robinson, in Parker, etc. Co., v. Reddick, said: "The fact that the tank was of the capacity of two hundred fifty barrel; that it was placed upon a foundation built expressly for it out of earth and lumber, and that the purchaser placed it on his own land, leads to the presumption that appellant intended to make the tank a permanent accession to the land."[25]

In Tibbits v. Moore, the Court said: "The materialman is properly said to have furnished' the materials, when he has delivered or has them ready for delivery, at the place where he has agreed to deliver them under the contract."[26]

So it is, after all, for the lawyer to ascertain to which class his client belongs or, in order to defeat the opposition, determine by the evidence whether the plaintiff is in the class which he alleges.

These statutes are made for a worthy purpose and fraud is sometimes practiced under them.

ROY E. RESSLER.

Gary, Ind.

(23) Steiner v. Haas, 108 Mich. 488, 66 N. W. 348.

(24) Clark v. Huey, 12 Ind. App. 224; Neeley v. Searight, 113 Ind. 316; Colter v. Frese, 45 Ind. 96.

(25) Parker, etc., Co. v. Reddick, 18 Ind. App. 616.

(26) Tibbets v. Moore, 23 Colo. 208-214.

MECHANICS' LIENS—HUSBAND AND WIFE.

FINCH v. CECIL et ux.

Supreme Court of North Carolina. Nov. 17, 1915.

86 S. E. 992.

An estate by the entirety cannot be made subject to a lien for materials furnished to either the husband or the wife for the purpose of erecting a building upon the property, without the consent of the other to such lien.

CLARK, C. J. This is an action to enforce liens for material furnished in the construction of two houses on lots owned by the defendants, husband and wife, to whom they had been conveyed in the same deed. It was admitted on the trial that the defendants were indebted to the plaintiff $68 for shingles used to cover one of the houses, and the jury found that the defendants also owed a further item of $67.90 for material used in building the houses.

[1] The sole question presented is whether such indebtedness is a valid lien upon the property, which was held by the defendants, Cecil and wife, in entirety. In this case the indebtedness is due by both the defendants who joined in the contract. If the debt were owing by the husband or by the wife for material furnished to erect a building upon property so held, it would be uncertain who would be the survivor, and in such case we have held that an estate by the entirety cannot be incumbered, nor a lien acquired upon it, without the assent of the other. West v. Railroad, 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 565. Nor would a judgment against either be a lien upon the property. Hood v. Mercer, 150 N. C. 699, 64 S. E. 897. The reason given is that:

"At common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the rights of the survivor." 15 A. & E. Encyclopedia (2d Ed.) 848, cited in West v. Railroad, supra.

[2] In this case the deed was made to the husband and wife, both being recited as grantees, and of course the property can be conveyed by them in like manner. It follows that they could by their joint deed place a mortgage upon it, and when the material furnished is under a contract made by them both the statutory lien given by Revisal, § 2016,

attaches. In Weir v. Page, 109 N. C. 220, 13 S. E. 773, the court held that as the law then stood, where the materials were furnished under a contract with the husband in the construction of a building on the wife's property, the materialman could file no valid lien against the house, though the wife knew that the work was being done and the material furnished, but had made no objection. This was because the material was furnished under a contract not binding upon the wife. The court, however, speaking through Judge Davis, in order to prevent further frauds of this kind, suggested in its opinion to the consideration of the legislature whether a married woman's liabilities might not be "made commensurate with her rights, and whether such alterations in the law (in this particular) would not prevent much injustice and many frauds." The result was the enactment of Chapter 617, Laws 1901, which has been added as the last paragraph in Revisal, § 2016, as follows:

"This section shall apply to the property of a married woman when it shall appear that such building was built or repaired on her land with her consent or procurement and in such cases she shall be deemed to have contracted for such improvements."

This statute does not even require an express contract by her, but provides that when she "consents or procures" the building to be erected or material furnished she shall be deemed to have contracted for such improvement, and her property thereupon becomes subject to liens, if filed. In Finger v. Hunter, 130 N. C. 529, 41 S. E. 890, this statute was held constitutional, and was enforced, and that case has been approved in Ball v. Paquin, 140 N. C. 96, 52 S. E. 410, L. R. A. (N. S.) 307, and other cases.

The above recital is taken from Payne v. Flack, 152 N. C. 600, 68 S. E. 16. This case is even stronger, because here it is admitted that both the husband and wife were liable for this indebtedness, and the Martin Act (Laws 1911, c. 109) has extended the power of a married woman to contract to all cases (except with her husband, under Revisal, § 2107), as follows:

"Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried."

The contract of the wife for this material being equally valid with that of the husband, the property is liable for the lien given to the materialmen by the statute. This is so, even if it were an implied contract, by the last paragraph in Revisal, § 2016, and for the stronger reason that the married woman is now liable on her contract as if unmarried, by the Martin Act.

This estate by the entirety is an anomalous one in the law. It has been derived from the common-law conception that the legal existence of the wife was merged in that of her husband, and hence a conveyance to them during coverture did not create a tenancy in common, which necessarily requires more than one tenant, but created an estate in entirety, under which the entire property was that of the husband during his life, with remainder to the survivor, and no lien thereon could be acquired by the deed of either one, without the assent of the other, nor could it be sold under execution against either. 21 Cyc. 1195, 1198. Nor could the property be aliened, nor any part thereof, without the consent of the other. Id. 1199.

In some of our states the doctrine of entirety has never been recognized, as in Connecticut, Minnesota, Ohio and Iowa. 21 Cyc. 1197. In England and many of our states the modern statutes relating to the property relation of husband and wife have abolished estates in entirety. In some this has been brought about by express enactment, as in Iowa, Maine, Massachusetts and New Hampshire. In others it has been held that estates in entirety were abolished inferentially by such statutes, changing the relation of married women as to the control of their property, as in Mississippi, Nebraska, West Virginia and Michigan, and in England. 21 Cyc. 1202. A similar summary will be found in 15 A. & E. Enc. (2d Ed.) 846-851.

It has been a doubtful question whether the granting of a divorce will destroy a tenancy by entirety and render the tenants in common. The weight of authority seems to be that it will. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918, 5 Ann. Cas. 534. This view has been adopted by our court in McKinnon v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396, holding, however, with citation of numerous authorities, that our Constitution and the later statutes relating to the property rights of married women have not thus far destroyed this estate by entirety. It is therefor a matter for the General Assembly whether it shall abolish this anomalous estate, which gives rise still to so many complications, and, the reason for which having long since ceased

to exist, the estate itself might well be abolished with injury to no one.

No error.

NOTE.—*Validity of Liens Upon Estates by Entirety Created by or Against Husband.*—This question is complicated by the question whether or not married women's acts have any effect on estates by entirety. Where such acts exist it is thought by the weight of authority that they do affect liens created by the husband to the extent of fixing the wife's right to possession and enjoyment during their joint lives. Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; Chandler v. Cheney, 37 Ind. 391; Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 568; Farmers' Bank v. Corder, 32 W. Va. 232, 9 S. E. 220; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81. In New Jersey it was ruled that such acts do change the status of estate by entirety by limiting the rights of a husband's creditors to subject the use of his half to the payment of his debts. Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52. And this view is taken by New York courts. Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762.

In Jordan v. Reynolds, 105 Md. 288, 66 Atl. 37, 9 L. R. A. (N. S.) 1026, it is held that a judgment against the husband is not a lien upon the property held by entirety during the life of the wife, because "judgments create liens only because the land is made liable by statute to be seized and sold on execution." To the same effect are Corinth v. Emery, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780 and Almond v. Bonnell, 76 Ill. 537.

But where during the life of the husband he "has the absolute control of the estate of the wife, and can convey or mortgage it for that period," this applies as well to estates by entirety as to any other property. Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692; Stoehler v. Knerr, 5 Watts (Pa.), 181; French v. Mehan, 56 Pa. 286; Roanes v. Archer, 4 Leigh (Tenn.) 550. This reasoning was applied by New Jersey to a mechanics' lien on a contract made by the husband. Washburn v. Burns, 54 N. J. L. 18.

Later it was held in Pennsylvania that a judgment against a husband would not prevent joint deed by himself and wife of property held by entirety. Beihl v. Martin, 236 Pa. 519, 84 Atl. 953, 42 L. R. A. (N. S.) 555. In discussion, the court, answering the contention that the judgments against the husband were liens, said: "But upon what? Certainly not upon the entirety that was in the husband, for the entirety of the estate was in the wife equally with the husband, and being in its nature indivisible, it would follow necessarily that any incumbrance upon the estate of the one would rest upon that of the other, a result which, of course, could not be justified or allowed, except as the inherent attributes of the estate are to be wholly disregarded."

Then admitting that generally an expectant interest, such as in survivorship in the husband may be taken in execution, it is denied that this expectancy may be, because "nothing can be taken in execution and sold as property of the debtor, except property over which the debtor has the right of disposition by sale or otherwise. If then the husband cannot sell or dispose of his expectancy of survivorship, it follows that it may not be taken in execution."

Hood v. Mercer, 150 N. C. 699, 64 S. E. 897, referred to by the instant case, has been followed in Haley v. Ice Mach. Co., 181 Fed. 890, affirmed in 111 C. C. A. 668, 191 Fed. 1004. See also Sharpe v. Baker, 51 Ind. App. 547, 96 N. E. 627; Schliess v. Thayer, 170 Mich. 395, 136 N. W. 365.

Sharpe v. Baker, *supra*, rules that since the married woman's acts, the husband is no longer entitled to the possession and control of his wife's separate estate, neither is he the owner of the rents and profits of an estate held by entireties and cannot individually dispose or incumber such an estate, nor can it be sold on execution for his debts. While generally the rents and profits are inseparable, yet an absolute divorce may convert an estate by entireties into an estate in common. It is said as to the latter point that: "As an estate by entireties can be created only as between husband and wife and is dependent entirely on the unity of their persons by marriage, anything which has the effect of destroying this unity during their lives destroys the estate." As supporting this proposition are cited Hayes v. Horton, 46 Ore. 597, 81 Pac. 386; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120.

C.

ITEMS OF PROFESSIONAL INTEREST.

OUTPUT OF THE COURTS FOR 1914.

The Docket, published by the West Publishing Company, in a recent issue conveys some interesting information concerning the number of cases decided by the appellate courts of the country in the year 1914. This information is as follows:

Court	Opinions per Year	No. of Judges	Average Opinions per Judge	Average Words per Opinion
Ala. Sup.	606	7	87	1,450
Ala. App.	363	3	121	928
Arizona	86	3	29	3,100
Arkansas	563	5	113	1,958
Cal. App.	441	9	49	1,950
Cal. Sup.	312	7	45	2,386
Colo. Sup.	151	7	22	2,470
Conn.	110	5	22	1,925
Delaware	86	7	12	3,198
Florida	199	5	40	1,229
Ga. App.	495	3	165	1,653
Ga. Sup.	595	6	99	1,256
Idaho	118	3	39	3,491
Illinois	432	7	62	2,433
Ind. App.	282	6	47	2,320
Ind. Sup.	199	5	40	2,736
Iowa	463	7	66	2,203
Kansas	493	7	70	1,851
Kentucky	913	8	114	2,073

Louisiana	398	5	80	2,379
Maine	172	8	22	2,379
Maryland	185	8	23	2,898
Massachusetts	488	7	70	1,303
Michigan	479	8	60	2,636
Minnesota	486	7	69	1,942
Mississippi	253	3	84	1,650
Missouri	1,180	20	59	2,831
Montana	121	3	40	2,450
Nebraska	402	7	57	2,207
Nevada	69	3	23	3,044
New Hampshire	77	5	15	1,248
New Jersey	607	24	25	1,542
New Mexico	99	3	33	2,223
New York	224	10	22	2,235
North Carolina	438	5	88	2,262
North Dakota	153	5	31	3,770
Ohio	73	7	10	3,289
Oklahoma Sup.	741	11	67	2,198
Okla. Cr.	211	3	70	1,337
Oregon	439	7	63	1,651
Pennsylvania	502	7	72	1,176
Rhode Island	123	5	25	2,892
South Carolina	295	5	59	1,365
South Dakota	180	5	36	2,853
Tennessee	122	5	24	3,362
Texas	1,841	30	61	2,241
Utah	91	3	30	3,627
Vermont	94	5	19	3,462
Virginia	150	5	30	2,145
Washington	720	9	80	1,662
West Virginia	295	5	59	2,821
Wisconsin	409	7	58	1,846
Wyoming	32	3	11	2,018

BOOK REVIEW.

DEWING'S CORPORATE PROMOTIONS AND REORGANIZATIONS.

This book, by Arthur S. Dewing, Ph.D., is the tenth of a series of Harvard Economic Studies. It is an analysis of the pathological in corporate life. A dozen select industries which have gone through periods of promotion. decline and reorganization have been made the subject of a detailed historical study. All conclusions, except so far as foreshadowed in the introduction, are reserved for three instructive chapters at the close.

The author points out the need for constructive imagination of the highest type during the period of corporate promotion and early activity. Present experience, a ready bond market, and the immediate path of least resistance have too often determined the permanent and important features of a financial plan, which later has failed because of this very lack of vision. These studies show, that much more important than the amount of capitalization is the form it takes and that length of life is not always measured by ease of birth.

They show, also, in convincing fashion, the elusive quality of monopoly and the limits to increase of profits through combination. Aside from the onslaughts of the law monopoly soon proves its own destruction. The excessive prices which it creates give rise to a host of competing plants which have to be dealt with at great expense or else endured. Industry is hydra-headed. Moreover, a combination which supplants the managerial forces of its components with a non-resident directorate loses a personal element of inestimable value.

But corporations have capitalized these fleeting values of monopoly and have issued quantities of stock against them. Then the crash has come. The machine has fallen to pieces, credit has been destroyed and the corporation has failed in an economic, if not in a legal sense.

It is at this juncture that a reorganization is affected. Everyone knows that a going concern is worth much more than the tangible assets which it owns. It is to preserve the values of good will, trade-name and the like, that creditors and stockholders become parties to a reorganization scheme designed to keep things going. All reorganizations involve sacrifices, the burden falling heaviest on those least secured, but if the reorganization is successful the losses are materially lessened.

Most of the reorganizations here outlined have had one of two objects in view; they have aimed to improve trade conditions by controlling production and eliminating competition, or they have sought to cure vital errors in the form of the capitalization. The first method is becoming more and more impossible under the law; the second is most often accomplished by reducing fixed charges on bonds and preferred stock. A corporation so capitalized can avoid legal failure indefinitely and adjust its finances in the course of time, without a reorganization. The fixed charges on large bond issues threw nearly 40 per cent of the railroad mileage of the country into the hands of receivers during the panic of 1893, while the depressions of 1903 and 1907, when capitalization was largely in the form of stocks, witnessed few industrial failures. The lesson is apparent.

Much of this book is a history of business methods which are now obsolete and which can never exist again. They belong to the period when big business first felt its strength and before that strength was controlled either from within or without. But as history, if rightly read, is a valuable guide for the future, so is this book. It has placed its finger on

prostrate business, and said, "Thou ailest here and here." It has mapped every reef upon which big business has heretofore foundered.

The work comprises 615 pages, and is issued by the Harvard University Press, Cambridge, Mass.

BOOKS RECEIVED.

American Annotated Cases. Containing the Cases of General Value and Authority Subsequent to Those Contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated. Volume 1915 D. Bancroft-Whitney Company, San Francisco. Edward Thompson Company, Northport, L. I., N. Y. Review will follow.

Legal and Business Forms (Other than court forms and forms peculiar to corporations). Including forms of deeds, wills, mortgages, leases, bills of sale, pledges, collateral securities, chattel mortgages, acknowledgments, releases, powers of attorney, bonds, building contracts and other instruments. With explanation and notes. By Francis B. Tiffany, Kansas City, Mo. Price $7.50. Vernon Law Book Company. 1915. Review will follow.

The American Digest, annotated. Key Number Series, Vol. 20. Continuing without omission or duplication the Century edition of the American Digest, 1658 to 1896, and the Decennial edition, 1897 to 1906. A Digest of All Current Decisions of All the American Courts, as Reported in the National Reporter System, the Official Reports, and elsewhere from December 1, 1914, to April 30, 1915. And Digested in the Monthly Advance Sheets for January, 1915, to and including May, 1915 (Nos. 292-296). Prepared and edited by the Editorial Staff of the American Digest System. Price, $6. St. Paul. West Publishing Company. 1915. Review will follow.

American State Trials. A collection of the important and interesting criminal trials which have taken place in the United States, from the beginning of our government to the present day. With notes and annotations. John D. Lawson, LL. D., editor. Volumes I, II, III and IV. St. Louis. F. H. Thomas Law Book Company. 1914. Review appeared in issue of Nov. 26. Price, $5.00 per volume.

HUMOR OF THE LAW.

A twelve-cylinder touring-car came dashing down Fifth avenue, violating all rules of the road. At the wheel was a man who looked like autocracy. It was very obviously his new car, and he was enjoying it alone. The pavement was wet, and the car skidded at Forty-second street, knocking a Ford runabout into the curb.

Policeman O'Flanagan saw the outrage and rushed over to the offending driver with blood in his eye. "What's your name?" said he, angrily.

The man in the big car stood up, smoothed down his well-cut coat, and said calmly "Casey."

O'Flanagan gulped hard, looked at the man suspiciously, and asked: "How do you spell it?"

"C-a-s-e-y."

"What's your first name?"

"Dennis."

O'Flanagan's face did a transformation act, and, leaning over, he said confidentially: "Now, what the hell are we going to do to that damned little Ford for backing into you that way? 'Twas an outrage!"—Everybodys.

Senator William S. Kenyon of Iowa, told at a dinner the story of two laborers endeavoring to "touch" their way through that state. One of them had gone up against a promising looking subject, but quickly turned away with a look of dejection.

"What story did you give him?" his pal queried.

"Told him I was so dead broke that I had to sleep out doors, and he said he was doing the same thing and had to pay a doctor for telling him to do it."—St. Louis Post-Dispatch.

In a recent decision the court said:

"It is clear that defendant was capable of transacting business even when his breath was loaded with the fumes of alcohol." 154 N. W. Rep. 214.

But how about the other fellow?

"If you do not instantly apologize for that remark," said the judge, "I shall commit you for contempt of court."

"Upon reflection, your honor," instantly replied the young attorney, "I find that your honor was right and I was wrong, as your honor always is."

The judge looked dubious, but finally said he would accept the apology.—Kansas City Times.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Abatement and Revival**—Death.—That appellee died after judgment, and no personal representative qualified did not prevent appellant from filing his transcript within the prescribed time and prosecuting his appeal by reviving the judgment in the Court of Appeals against appellee's representatives.—Monroe v. Brown, Ky., 178 S. W. 1169.

2. **Adoption**—Descent and Distribution. —Where intestate left surviving her the children of an adopted child who had died prior thereto, such children were entitled to the share which their mother would have taken if living. —In re Webb's Estate, Pa., 95 Atl. 419.

3. **Adverse Possession**—Inclosures.—Title by adverse possession could not be predicated on a possesion within the boundary of a tract owned by defendant, and interlapping the land in controversy, where defendant's inclosure was not within the interlap.—Daniel v. Dayton Coal & Iron Co., Tenn., 178 S. W. 1187.

4. **Aliens**—Deportation.— Alien immigrants cannot be deported under Act Feb. 20, 1907, § 2, as amended by Act March 26, 1910, §1, as likely to become a public charge because the labor market is overstocked.—Gegiow v. Uhl, U. S. S. C., 36 S. Ct. 2.

5. **Appeal and Error**—Constitutional Law.—A county treasurer has no such personal interest in the litigation as entitles him to writ of error in the federal Supreme Court to review a judgment of a state court compelling him to account to a city under certain taxing statutes in the state, claimed by him to be unconstitutional.—Stewart v. Kansas City, U. S. S. C., 36 S. Ct. 15.

6. **Assault and Battery**—Intruder.—The owner or occupant of premises may use such force as may be "reasonably necessary" to remove an intruder who refuses to leave after requested to do so.—Lunsford v. Hatfield Coal Co., Ky., 178 S. W. 1166.

7. **Assignment for Benefit of Creditors**—Levy and Sale.—Property vested in an assignee for the benefit of creditors was not subject to levy and sale by a creditor as the property of the execution debtor, and such a sale gave the execution creditor no interest as against the assignee.—Gilbert v. Morgan Lumber Co., of Toppenish, Wash., 151 Pac. 785.

8. **Bankruptcy**—Abatement by Death.—Under Bankr. Act, § 8, bankruptcy proceedings once begun held not to abate on death of bankrupt. —In re Agnew U. S. D. C., 225 Fed. 650.

9.——Composition.—Confirmation of a composition will not be denied, on the ground that the bankrupt failed to keep proper books, unless an intent to conceal his condition is shown. —In re Silberstein, U. S. D. C., 225 Fed. 665.

10.——Exemption.—A bankrupt, to whom personalty claimed as exempt has been set apart, may thereafter execute and file for record a declaration of homestead, as required by state law, and have the same set apart as exempt.—In re Lehfeldt, U. S. D. C., 225 Fed. 681.

11.——Final Judgment.—Under Code Civ. Proc. Cal. § 942, a judgment for damages for personal injuries, from which an appeal has been taken without bond, is a final judgment, on which a claim against a bankrupt's estate can be based. —In re Berlin Dye Works & Laundry Co., U. S. D. C., 225 Fed. 683.

12.——Liens.—Bankr. Act July 1, 1898, § 67, relates merely to levies, judgments, attachments, and liens acquired through legal proceedings, and not to contractual or quasi contractual liens.—Gray v. Arnot, N. D., 154 N. W. 268.

13.——Preference.—Something more than suspicion is necessary to put a creditor on inquiry as to the solvency of his debtor, and to charge him with reasonable cause to believe that a payment to him will effect a preference over other creditors.—Brookheim v. Greenbaum, U. S. D. C., 225 Fed. 635.

14.——Priority.—Bankr. Act, § 64a, does not give the landlord of a bankrupt a priority for his claim for taxes, which the lease required the bankrupt to pay.—In re William A. Harris Steam Engine Co., U. S. D. C., 225 Fed. 609.

15. **Banks and Banking** — Certification. — Where a check is certified by the drawee bank, it is not material to the certifying bank's liability whether the makers had a deposit in the bank sufficient to meet same.—Security State Bank v. State Bank of Brantford, N. D., N. D., 154 N. W. 282.

16.——Collateral.—Where a bank sells collaterals securing a note and applies the surplus proceeds to another note of the maker executed to a director of the bank, it is liable for the surplus to the maker and cannot sue to make such application to the second note until it surrenders the collaterals or the proceeds thereof which it holds in trust for the maker. —Newsome v. Bank of Ahoskie, N. C., 86 S. E. 499.

17. **Bills and Notes**—Assumption of Debt.—That defendant, after the death of plaintiff's husband, signed the husband's note for security of a bank, which plaintiff thereafter agreed to assume, does not show that defendant was liable for its payment, and that he could not, having paid it at plaintiff's request, recover.—Layton v. Lewis, S. C., 86 S. E. 483.

18.——Bona Fide Holder.—Where one partner, without knowledge, consent, or approval of the other, indorses a firm check in payment of his past due debt, a recipient receiving same knowing that it is so used and that the partnership

is insolvent is not a bona fide holder thereof.—Nichols & Co. v. Thomas, Okla., 151 Pac. 847.

19.——Due course.—One acquiring a note by purchasing the assets of an insolvent state bank from the bank commissioner is not a holder thereof in "due course."—Ward v. Oklahoma State Bank of Atoka, Okla., 151 Pac. 852.

20.——Indorser.—An indorser of a note before maturity who, by its terms, consents to any extension of time thereon that may be granted, and waives notice of such extension, waives notice of nonpayment and dishonor at the end of the extension.—First Nat. Bank of Henderson v. Johnson, N. C., 86 S. E. 360.

21.——Undue Influence.—Solicitation, importunity, and persuasion are not necessarily undue influence, but with a person of great age, feeble physically and mentally, where the relations between the parties are intimate, they may constitute "undue influence."—Geddes v. McElroy, Iowa, 154 N. W. 320.

22. **Breach of Marriage Promise**—Justification.—A woman's unchastity before or pending a promise of marriage, if unknown to the man, if the promise be not renewed after knowledge thereof, legally justifies a man in breach of the promise of marriage.—Garmong v. Henderson, Me., 95 Atl. 409.

23. **Carriers of Goods**—Act of Third Persons.—A carrier held not liable for loss of property not properly baggage if the loss was caused by accident, act of some third person, or its ordinary negligence.—Gibbons v. Chicago, B. & Q. Ry. Co., Neb., 154 N. W. 226.

24.——Carriage by Sea.—Carmack amendment to Interstate Commerce Act June 29, 1906, held to allow an initial carrier to avail itself of defenses open under federal statutes to the connecting carrier causing the loss, although the shipment was lost at sea by such carrier.—Brinson & Kramer v. Norfolk Southern R. Co., N. C., 86 S. E. 371.

25.——Conversion.—A carrier, which has converted a shipment will be deemed to have abandoned the shipment contract, and be precluded from relying on a provision thereof limiting its liability, where the negligence which occasioned the loss was wanton or willful.—Nashville, C. & St. L. Ry. Co. v. Truitt Co., Ga. App., 86 S. E. 421.

26.——Misrouting.—Where a carrier misrouted a shipment of horses, and, upon failure to appear at the expected point, plaintiff wired a commission house to take charge of them, and they were put in a stockyards barn, where they contracted fever and died, the carrier was not liable for the injury.—Rosenthal v. Chicago & N. W. Ry. Co., Wis., 154 N. W. 367.

27. **Carriers of Passengers**—Postal Clerk.—Where petition alleged that plaintiff, a postal clerk, was injured by the negligence of the engineer of the terminal carrier, but the evidence showed it was from negligence of employe of initial carrier, using the track of the terminal carrier, plaintiff could not recover.—Western & A. R. Co. v. Peacock, Ga. App., 86 S. E. 389.

28. **Commerce**—Carmack Amendment. — The proviso of the Carmack amendment does not continue in force the rights and remedies given by state laws, where an interstate shipment has been lost, injured, or damaged, but only any rights under existing federal laws.—Southern Ry Co. v. Bennett, Ga. App., 86 S. E. 418.

29.——Long and Short Haul.—On an application by a carrier to the Interstate Commerce Commission for an order suspending the long and short haul provision of the statute, the carrier has the burden to show that it is a "special case."—Louisville & N. R. Co. v. United States, U. S. D. C., 225 Fed. 571.

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33.——Intoxicating Liquors.—Boner Law, § 12, making it unlawful to receive or accept delivery of or possess intoxicating liquors of more than a specified quantity, held not in conflict with Const. 1901, §§ 1, 35.—Southern Express Co. v. Whittle, Ala., 69 So. 652.

34.——Motion Picture Films.—Act June 19, 1911 (P. L. 1067), providing for appointment of state board of censors of picture films, held not violative of the Bill of Rights.—Buffalo Branch, Mutual Film Corporation v. Breitinger, Pa., 95 Atl. 433.

35. **Contempt**—Disbarment.—Publication by an attorney of a prediction that the supreme court would not disbar a candidate for Governor because, if it did, the candidate would make political capital out of a recent decision of the supreme court, held a contempt.—State v. Kirby, S. D., 154 N. W. 284.

36. **Contracts**—Breach.—Under a contract whereby defendant obtained a mortgage loan on property of plaintiff, for one year, his failure to pay the note and release the mortgage at the expiration of the year as agreed held a breach of his contract, though, as between himself and the mortgagee, the mortgage was not due.—Turner v. Howze, Cal. App., 151 Pac. 751.

37.——Mistake of Law.—Where a party, with knowledge of the facts, contracts under an ignorance of law, the courts will not ordinarily relieve him from the consequences of his mistake.—Clark v. Lehigh & Wilkes-Barre Coal Co., Pa., 95 Atl. 462.

38. **Corporations**—Charity.—An incorporated volunteer fire company not being a public charity, its property, on its dissolution, goes to its surviving members, and does not revert to its grantors or escheat.—Neptune Fire Engine & Hose Co. v. Board of Education of Mason County, Ky., 178 S. W. 1138.

39.——Holding Corporation.—Where a holding corporation, owning all the stock of another, is without authority under its charter to conduct the business of the controlled corporation, the independent existence of the two must be recognized by a court of equity—Sabre v. United Traction & Electric Co., U. S. D. C., 225 Fed. 601.

40.——Receiver.—In suit by minority stockholders against corporation, charging mismanagement and fraud of majority, it is not necessarily wrong to appoint an attorney in the cause receiver, though practice is not to be commended, unless by consent.—Mitchell v. Aulander Realty Co., N. C., 86 S. E. 358.

41. **Courts**—Federal Question.—No federal question is presented by state law, which, as construed by a state court, compels county to reimburse city for amount by which taxes collected for the city are reduced on prompt payment, and requiring county to pay over to city penalties for delay in payment of taxes of cities of the first class, while in cities of other classes rebates are charged to the county and penalties credited to it.—Stewart v. Kansas City, U. S. S. C., 36 S. Ct. 15.

42.——Jurisdiction.—Where it did not appear that any property of nonresident defendants served by publication had been reached by the attachment issued, or that the county in the state upon whom it was served was indebted to the defendant, the court was without jurisdiction.—Everett v. Austin Bros., N. C., 86 S. E. 523.

43.——Jurisdiction.—A suit does not arise under the patent laws of the United States, where it is brought to enforce payment of royalties under a contract and to annul a patent for an improvement issued after the contract and assigned to defendant.—Briggs v. United Shoe Machinery Co., U. S. S. C., 36 S. Ct. 6.

44. **Criminal Law**—Continuance.—The denial of a continuance held not an abuse of discretion where the absent witness was sick, and it appeared improbable that he would be able to attend at the next term of court if ever.—McAllister v. State Ga., App., 86 S. E. 412.

45.——Intoxicating Liquor.—Permitting a local railroad agent to explain notations on bills of lading and receipts for consignments of liquor to accused held not error, where it appeared that such notations were made in the regular course of business and were unfamiliar to persons outside the railway service.—State v. McKone, N. D., 154 N. W. 256.

46.——Trial.—Where the state concedes on appeal that facts exist, as disclosed after the trial, which could not have been known at the trial, and which, if unexplained, render it improbable that defendant is guilty, a new trial will be awarded.—Franco v. State Neb., 154 N. W. 236.

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48.——Measure of.—Where injury results in the loss of use of personal property during repairs, the owner may recover reasonable value of such use during the time reasonably necessary for repairs, making it as good as it was immediately before the injury.—Kentucky v. Kentucky Grocery Co., Ky., 178 S. W. 1162.

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51. **Discovery**—Books and Papers.—In suit on life insurance policy participating in insurer's profits, held, that order that insurer produce its books, records, etc., before commissioners in a distant state was erroneous.—Equitable Life Assur. Society v. Hardin, Ky., 178 S. W. 1155.

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53. **Electricity**—Negligence. — An electric light company, with notice of the break in its wires, was negligent in not shutting the current off until it ascertained that it was safe to keep it on.—Lexington Utilities Co. v. Parker's Adm'x, Ky., 178 S. W. 1173.

54. **Embezzlement**—Larceny. — Where the owner of property, which another has procured by fraud, voluntarily intrusts the possession to such other, who thereafter converts the property to his own use, the offense is not simple larceny, but is larceny after trust.—Lanier v. State, Ga. App., 86 S. E. 417.

55. **Eminent Domain**—Special Benefit.—A valuable ice privilege accruing to the owner of the residue of a tract a portion of which was caused to overflow by the construction of a dam, held a special benefit which could be set off against incidental damages.—In re Bayes, Neb., 154 N. W. 231.

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69.——Pleading.—Striking of garnishment case from the docket on motion of the garnishee held error, where it appeared that the garnishee had waived any irregularity or invalidity in the garnishment summons by appearing and plead-

ing to the merits.—Citizens' Nat. Bank v. Swift Fertilizer Works, Ga. App., 86 S. E. 403.

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72. **Homicide**—Dying Declarations. — Where declarant is in a dying condition and unable to speak, that in response to questions her answers were indicated by nodding and shaking her head is no objection to the admissibility of such declarations.—Poling v. State, Okla., 151 Pac. 895.

73.——Manslaughter. — "Involuntary manslaughter" in the commission of a lawful act consists of the killing of a human being without any intention to do so, in the commission of a lawful act which might probably produce death, and in a manner not justified by law.— Roughlin v. State, Ga. App., 86 S. E. 452.

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75. **Insurance**—Foreign Corporation.—Company which agreed to procure for subscribers medical services, drugs, and merchandise from a physician and retailers, not guaranteeing the performance by them held not engaged in insurance business within the insurance Code.— State v. Universal Service Agency, Wash., 151 Pac. 768.

76.——Sole Ownership.—In a policy covering either real or personal property, provision avoiding it if insured's interest was other than unconditional and sole ownership held not to apply to buildings constituting real estate.— Scott v. Liverpool & London Globe Ins. Co., S. C., 86 S. E. 484.

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82. **Master and Servant**—Breach of Contract. —Where defendants breached their contract to employ plaintiff in removing lumber, plaintiff cannot recover damages resulting from the nonuse of his teams and equipment without proof that he was reasonably diligent in trying to find other work.—Madison-Jackson-Estill Lumber & Development Co. v. Coyle, Ky., 178 S. W. 1170.

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84.——Proximate Cause.—A railroad, locating its tracks in a street under plans approved by city, held not liable for death of fireman, leaning out while engine rounded a curve near which a car stood, though clearance was two feet less than standard.—Reese v. Philadelphia & R. Ry., U. S. C. C. A. Co., 225 Fed. 518.

85.——Safe Place to Work.—The duty of the master to furnish a reasonably safe place to work held to apply where a miner was injured by the derailment of a motor which he had procured to enter the room where he was working to remove a loaded car therefrom.—Consolidation Coal Co. v. Moore, Ky., 178 S. W. 1136.

86.——Safe Place to Work.—Where a car repairer was injured by the falling of a side of a box car he was repairing, the company's failure to remove rubbish around the car held not a breach of duty to furnish a safe place to work.—Bunn v. Atlantic Coast Line R. R., N. C. 86 S. E. 503.

87.——Safe Place to Work.—A master, who has exercised ordinary care to furnish a reasonably safe place to work, and reasonably safe appliances, and reasonably competent fellow servants, cannot be held liable to a servant for injuries due to the ordinary risks.—Gelruth v. Charles T. Derr Const. Co., Okla., 151 Pac. 875.

88.——Warning.—Where a cotton mill employe was warned generally that there was danger in operating his machine, such danger not being specified, but he being forbidden to use his hand to gather up waste in any event, in so using his hand he assumed all risk of injury.—Baldwin v. Piedmont Mfg. Co., S. C., 86 S. E. 379.

89. **Mechanics' Liens**—Homestead.—The filing of a homestead declaration will not cut off the right of a materialman, whose material has already gone into the building, to perfect his lien by filing the proper notice within the statutory time.—Brace & Hergert Mill Co. v. Burbank, Wash. 151 Pac. 803.

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96.——Imputable.—Although negligence of driver of automobile which ran over and killed a pedestrian, cannot be imputed to one merely riding with him, the rule is otherwise where the parties are engaged in a common enterprise, the driver is the other's servant, or the machine is owned by the other, who is in control or has a right to control it.—Crawford v. McElhinney, Iowa, 154 N. W. 310.

97.——Proximate Cause.—If the original act is wrongful, and would naturally prove injurious to some one, and does actually result in injury through the intervention of other causes not wrongful, the injury is referable to the wrongful act.—Lexington Utilities Co. v. Parker's Adm'x, Ky., 178 S. W. 1173.

98. **Patents**—Constitutional Law.—A holding that a city could not specify and make a patented pavement alone acceptable for a public improvement does not violate the patentee's constitutional right to have the exclusive right to manufacture and sell the patented article.—Temple v. City of Portland, Ore., 151 Pac. 724.

99. **Payment**—Presumption.—Proof that at the time of his death deceased had in his possession a note he had given to plaintiff raises a disputable presumption that the debt was paid.—Orr v. Stewart, Ala. App. 69 So. 649.

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108.——Constitutional Law.—Under Page & A. Gen. Code Ohio §§ 5495—5521, imposing an annual franchise tax on corporations, such tax is not collectible against the assets of an insolvent corporation in the hands of its receiver in trust for creditors, as it would take from the creditors what belongs to them contrary to the Constitution.—Keeney v. Dominion Coal Co., U. S. D. C., 225 Fed. 625.

109. **Telegraphs and Telephones**—Contributory negligence.—Where a message was addressed so that company's agent located sendee and was prevented from delivering it only by his own fault, there was no issue of contributory negligence in the addressing it.—Medlin v. Western Union Telegraph Co., N. C., 86 S. E. 366.

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